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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRYANT JOSEPH FILER, Defendant and Appellant.	B172002 (Los Angeles County Super. Ct. No. BA213135)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Modified and affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

PROCEDURAL BACKGROUND

On February 5, 2002, an amended information was filed charging appellant, Duana Underwood, and Caesar Duncan in count 1 with the murder of Buford Bates (Pen. Code,[1] § 187, subd. (a)), and in count 3 with conspiracy to murder Bates (§ 186, subd. (a)(1)). It also charged appellant alone in count 4 with the murder of Jeffrey Shapiro. (§ 187, subd. (a).)

Regarding Bates's murder, the information alleged as a special circumstance that it was intentionally committed by appellant and Underwood by lying in wait. (§ 190.2, subd. (a)(15).) In addition, the information alleged that it was connected with gang activity (§ 186.22, subd. (b)(1)), and a principal had personally and intentionally used a firearm (§ 12022.5, subd. (a), 12022.53, subds. (b)-(e)).

Regarding Shapiro's murder, the information alleged as a special circumstance that it and Bates's murder constituted multiple murders. (§ 190.2, subd. (a)(3).) In addition, the information alleged that appellant had personally and intentionally used a firearm. (§ 12022.5, subd. (a)(1), 12022.53, subds. (b)-(d).)

Finally, the amended information alleged offenses by persons other than appellant. It charged Sandro Barmet with being an accessory after the fact to Bates's murder (§ 32), and Tony Jake with attempting to dissuade a witness from testifying, and making criminal threats (§§ 136.1, subd. (a)(2), 422).

Appellant pleaded not guilty and denied the special allegations. On October 22, 2002, the trial court severed the trial of appellant and Underwood from that of Duncan, Barmet, and Jake. Prior to appellant's trial, the charges against

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

Barmet were amended, and he pled no contest to them, pursuant to a plea agreement.

Trial by jury of appellant and Underwood began on May 13, 2003. On June 16, 2003, the jury found appellant guilty of the first degree murder of Shapiro and Bates and conspiracy to murder Bates, and found the special allegations to be true. The jury acquitted Underwood of all charges.

Regarding Shapiro's murder, the trial court sentenced appellant to a term of life imprisonment without the possibility of parole (LWOP), doubled pursuant to the "Three Strikes" law, plus another doubled term of 25 years to life. (§ 12022.53, subd. (d).) In addition, it imposed a three-year enhancement (§ 12022.5, subd. (a)), which it stayed (§ 654).

Regarding Bates's murder, the trial court sentenced appellant to LWOP, doubled pursuant to the Three Strikes law, plus another doubled term of 25 years to life. (§ 12022.53, subd. (d).) It also imposed and stayed a term of 25 years to life for conspiracy to murder Bates. (§ 654.)

FACTS

A. *Prosecution Evidence*

1. *Background*

Appellant is sometimes called "Dae Dae." In the early 1990's, appellant met Barmet and Duncan, who were friends.[2]

Appellant and Duncan are members of the Black Gangster Disciples, an organized gang originally centered in Chicago, but now found in 35 states,

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[2] During this period, Barmet killed Derwin Smith. According to Barmet, he acted in self-defense after Smith tried to rob him and put a knife to his neck. Barmet was arrested, but ultimately was not charged with any crime.

including California. Underwood also has tattoos indicative of membership in this gang. The Black Gangster Disciples belong to an affiliation of gangs called "the Folks."

2. *Shapiro's Murder*

Alicia Williams, who was Shapiro's girlfriend prior to his death, testified that Shapiro was addicted to rock cocaine. He borrowed money from her to buy drugs, and she twice saw Shapiro buy drugs from appellant in a hotel room in the San Fernando Valley.

According to Thomas Rodriquez, he "cosigned" a drug purchase by Shapiro from appellant, that is, he agreed to pay for the drugs if Shapiro did not. In the early evening of May 17, 1999, Shapiro and appellant visited Rodriquez. Appellant demanded that he receive his money for the purchase that night, and displayed a gun. Appellant and Shapiro then left Rodriguez's location.

The key witness regarding Shapiro's murder was Barmet, who testified as follows: In 1999, he owned a handgun, and sold marijuana from his apartment. Appellant lived with Barmet, and sold crack cocaine.

On May 17, 1999, Shapiro came to Barmet's apartment to buy some cocaine from appellant. Shapiro and another visitor, Vincent Garcia, began an argument which appellant joined. Barmet, who was studying for an accounting exam, asked them to "take it somewhere else." He then heard five gunshots and dived for the floor. Someone yelled, "Dae Dae, why'd you do that," and appellant and Garcia ran out of the apartment. Barmet did not directly see appellant shoot Shapiro.

Barmet later learned that Shapiro had been killed with his gun. He confronted appellant, and informed him that he had told the police that appellant had killed Shapiro. Appellant did not deny that he had shot Shapiro. Barmet never recovered his gun.

Vincent Garcia testified that on May 17, 1999, he got into an argument with Shapiro in Barmet's apartment. At Barmet's and appellant's requests, Garcia left the room. Shortly thereafter, appellant entered the room in which Garcia was present, grabbed a gun, and walked out. Garcia heard shots and left Barmet's apartment. Garcia did not see appellant shoot Shapiro.

Larry Wilks also provided evidence regarding Shapiro's murder. In May 1999, Wilks lived in Barmet's apartment building in the San Fernando Valley. At trial, he denied any memory of the pertinent events, citing his frequent drug use. According to a statement that he gave in June 1999, he heard appellant yelling in Barmet's apartment on May 17, 1999. He visited Barmet's apartment, where he saw appellant, Barmet, and Shapiro, as well as several other people. He saw appellant handling a gun and heard Shapiro promise to return with "a C-note." Shapiro then left the apartment. Later, when Wilks was in his apartment, he heard several loud booms, followed by a voice asking, "What the fuck you do that for, Dada?"

In addition, statements that Cindy Remagen made to the police in September 1999 were admitted into evidence. Remagen stated that her daughter, Heidi McCalla, told her that appellant hid a gun and then informed a third party that he had "shot a white guy because he was disrespectful." At trial, McCalla denied any knowledge of this conduct by appellant, and Remagen denied that she had made the police statement in question.

3. *Bates's Murder*

Barmet also testified regarding the events preceding Bates's murder. According to Barmet, he obtained a second gun in early 2000. Duncan, who had left the Los Angeles area in 1994, returned in 2000. After Duncan's return, Barmet

encountered him approximately four times, and gave him rides to the apartment of Tony Jake, where Barmet saw appellant and Underwood.

In October 2000, Barmet was at a gathering in North Hollywood also attended by appellant, Duncan, and Underwood. In Barmet's presence but without his consent, appellant and Underwood took Barmet's gun from his car. Barmet asked Duncan to retrieve his gun, but it was not returned to him, and Duncan told him that it had been used in a killing. Barmet then filed a police report falsely indicating that the gun had been stolen by someone other than appellant and Underwood, and he gave conflicting statements to the police about the loss of his gun.[3]

Tanita Hall, a waitress at La Louisiana, testified that Bates watched the Monday night football game at her restaurant on October 23, 2000. At approximately 11:00 p.m., Bates told Hall that he was taking two guys to North Hollywood. According to Gregory Reece, a security guard at La Louisiana, Bates and two friends drove away in a new model black truck.

Crystal Bates, who was Bates's wife, testified as follows: A week or so prior to Bates's murder, Jake and his brother Demetrius[4] followed Crystal and Bates into a restaurant in Woodland Hills. Jake hit Bates on the back of his head, and they engaged in a brief struggle.

Crystal Bates further testified that Bates owned a black F-150 truck, and he regularly watched Monday night football at La Louisiana, which was near their home. At about 11:00 p.m. on October 23, 2000, Bates stopped at his home after

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[3] Barmet also testified that he was charged with being an accessory after the fact to Bates's murder, and he eventually entered into a plea agreement regarding a lesser charge.

[4] Demetrius Jake is also sometimes called "Demitry" in the record.

visiting La Louisiana and told Crystal that he was going to give "Tony Jake's boys" a ride to North Hollywood. Bates identified one of the two men in his truck as "Dae Dae." Crystal could not recall the name of the other man. Both men were in rear passenger seats.

Arthur Cunningham testified that at between 11:15 and 11:30 p.m. on October 23, 2000, he heard two pops outside his home and heard an engine revving. Cunningham saw a stationary pickup truck whose driver was slumped over.

Police officers and investigators testified that inside the truck was Bates, who had been fatally shot in the back of his head with Barmet's gun. That gun was found nearby, and the truck contained bullet casings expended from the gun. A rear passenger window was shattered, and most of the broken glass was outside the truck.

At approximately 11:20 p.m. on October 23, 2000, officers responding to the shooting saw appellant and Underwood on foot in the vicinity of the shooting. Appellant appeared to be making a phone call. Shortly thereafter, the officers detained appellant and Underwood, who had entered a vehicle driven by Edwin Seawood, Jake's cousin and roommate. One of the officers observed blood on Underwood's clothing, and they discovered that he was subject to an outstanding misdemeanor warrant for possession of marijuana. They released appellant and Seawood at the scene and arrested Underwood, who was released later. Blood on Underwood's shoes and Barmet's gun was subsequently discovered to match Bates's blood.

Walter Kipp, a deputy sheriff employed in Kalamazoo County, Michigan, testified that Underwood was incarcerated in Michigan in February and March 2001. Kipp then heard Underwood say, "I didn't kill anybody. I was there, but I

didn't pull the trigger. My attorney told me to leave California, but my -- I think my attorney works for them, not for me."

LAPD Detective Daryn Dupree testified that he and LAPD Detective Kelly Cooper traveled to Michigan in March 2001 and brought Underwood back to Los Angeles. During the trip to Los Angeles, Underwood provided a statement regarding Bates's murder.

B. *Underwood's Defense Evidence*

Underwood testified on his own behalf. According to Underwood, in 1993 he became a member of a gang called "Growth and Development," which was devoted to curing the "negativity" within urban communities. He denied that he belonged to the Black Gangster Disciples, which he characterized as a faction that had broken with Growth and Development. He also denied that he had committed any crimes in connection with his membership.

Underwood met appellant and Duncan in 1999, and Jake in 2000. He occasionally bought marijuana from Barmet, but otherwise had little contact with him. Underwood denied that he helped appellant obtain a gun from Barmet, and stated that he felt intimidated by Barmet. Underwood also met Bates one time at Jake's house.

Shortly after Shapiro's murder, Underwood gave a ride to appellant and his girlfriend. Appellant said, "I fucked up." Underwood sought an explanation for this remark and asked, "Did anybody get shot?" Appellant answered, "Yeah, white boy."

On October 23, 2000, Underwood went to buy marijuana at Jake's residence, where appellant and Duncan were also present. Jake said to him, "I want you to kill somebody." When Underwood refused, Jake's brother Gregory

threatened to harm Underwood's family. Jake then gave Underwood a gun. Underwood did not recognize the gun.

Underwood got in Demetrius Jake's van, accompanied by appellant and Duncan, and they drove to La Louisiana. Jake also went there, but soon left. While Demetrius Jake and appellant spoke to Bates, Underwood smoked cigarettes outside the restaurant.

Underwood and appellant then entered Bates's truck. Underwood sat in a rear passenger seat. When Bates stopped at his home, Underwood tried to persuade appellant to help him get out of the situation, and he handed appellant the gun. Appellant said, "All right, you know, we ain't going to do it."

After Bates resumed driving, appellant said, "I have to take a piss." When Bates stopped, appellant got out of the truck, opened the passenger door next to Underwood, leaned across Underwood, and shot Bates in the back of his head. Appellant then threw the gun into the truck next to Underwood. Underwood tried to open the truck's door, but it would not open. He shot out a window, escaped from the truck, threw the gun into some bushes, and ran away.

Brian Granville contacted Underwood upon his arrest and said that Jake had hired him to represent Underwood.[5] After Underwood was released from jail, Granville advised him to leave California, stating that Underwood "was messing with . . . some very bad guys." Underwood went to Michigan, where he was jailed. While in jail, he made the remarks to which Kipp had testified.

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[5] Underwood's testimony regarding Granville's reference to Jake was admitted only to establish Underwood's state of mind.

When Underwood returned to California, he was visited in jail by McCalla and Granville, who was no longer Underwood's attorney. They told him that he should keep his mouth shut about the case.

The parties stipulated that Eduardo Nunez and Birchus Fergusson would have testified that at approximately 11:15 p.m. on October 23, 2000, they heard a single gunshot, the screech of tires, and then another single gunshot.

Robin Simpson, Underwood's mother, testified that she visited him while he was incarcerated in Michigan. He denied killing anyone, and said to her, "But I was there, but I didn't do it."

Detective Dupree testified that Underwood made a statement when he brought Underwood from Michigan to California. This statement was consistent with Underwood's testimony at trial.

Detective Cooper testified as follows: After Cooper learned that Barmet was the owner of the gun used to kill Bates, he interviewed Barmet, who stated that appellant, Duncan, and Jake had a role in Bates's murder, but initially denied that Underwood had taken his gun. During a subsequent interview, Barmet stated that Underwood had taken his gun. Crystal told Cooper that safety locks on Bates's truck prevented the rear passenger doors from opening while the engine was running.[6]

Finally, Clemens Bartollas, a sociologist, testified that Growth and Development was a movement that emerged from the Gangster Disciples, and it aimed at defusing violence in prisons and in the community.

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[6] LAPD Detective Wendi Berndt testified that she had investigated the killing of Derwin Smith by Barmet in 1993. Smith had contact wounds on his body, and a knife was found nearby. Barmet admitted that he killed Smith four days after the incident, and a scratch was observed on Barmet's body.

C. *Appellant's Defense Evidence*

Appellant testified on his own behalf. According to appellant, the focal point of the Gangster Disciples was growth and development. The Gangster Disciples were well organized, and had a lot of rules, including a code of silence. The Folks aimed at solving internal community problems. Its members were trying not to be criminals. Barmet was a Gangster Disciple, as was appellant and Underwood. Jake was not a Gangster Disciple.

Appellant was present in Barmet's apartment when Shapiro was killed. He denied shooting Shapiro, but declined to identify the killer, citing his group's principles. He called Barmet "a master manipulator." He also denied telling McCalla that he had killed Shapiro.

After Shapiro's shooting, appellant was incarcerated for a year due to a parole violation. He testified that he did not take Barmet's gun, and he denied any role in Bates's murder. According to appellant, Underwood paged him on October 23, 2000. In turn, he paged Seawood, and they went to look for Underwood.

DISCUSSION

Appellant contends that: (1) the trial court erred by failing to give jury instructions regarding accomplice testimony; (2) his counsel rendered ineffective assistance by failing to request such instructions; (3) he was improperly excluded from a hearing; (4) the trial court improperly doubled the LWOP terms and gun use enhancement (§ 12022.53, subd. (d)) in sentencing appellant for the murders of Bates and Shapiro; and (5) there was sentencing error under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531].

A. *Accomplice Instructions*

Appellant contends that the trial court committed reversible error by failing to instruct the jury regarding accomplice testimony from Underwood and Barmet. Appellant did not request any instructions on accomplice testimony, and he argues that the trial court was obliged to give these instructions sua sponte. As we explain below, we do not discern reversible error.

1. *Governing Law*

A defendant may not be convicted "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (§ 1111.) An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial. (§ 1111.)" (*People v. Coffman* (2004) 34 Cal.4th 1, 104 (*Coffman*).) The phrase "liable to prosecution," as used here, means "*properly* liable." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 759.) To be an accomplice, the witness must be chargeable with the crime, and not merely as an accessory after the fact. (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*Coffman*, *supra,* 34 Cal.4th at p. 104.) CALJIC No. 3.10 defines the term "accomplice,"[7] CALJIC Nos. 3.11 and 3.12 state the requirement for corroboration of accomplice

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[7] CALJIC No. 3.10 states: "An accomplice is a person who [is] [was] subject to prosecution for the identical offense charged [in Count[s] ____] against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy]."

testimony,[8] and CALJIC No. 3.18 cautions the jury to view such testimony with "care and caution."[9]

Our Supreme Court clarified the trial court's duties regarding accomplice testimony instructions in *People v. Guiuan* (1998) 18 Cal.4th 558 (*Guiuan*) and *People v. Box* (2000) 23 Cal.4th 1153 (*Box*). In *Guiuan*, a case involving a single defendant, the court surveyed then-applicable case authority and identified several rules governing these duties when the prosecution or the defendant presented accomplice testimony. (18 Cal.4th at pp. 564-569.) These rules predicated the trial court's duty to instruct sua sponte on whether the prosecution or the defendant

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8 CALJIC No. 3.11 states in pertinent part: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense."

CALJIC No. 3.12 states: "To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice is corroborated."

9 CALJIC No. 3.18 states: "To the extent that an accomplice gives testimony that tends to incriminate [the] [a] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case."

had called a witness, and whether the witness's testimony was favorable or unfavorable to the defendant. (*Ibid*.)

The court in *Guiuan* abandoned these rules, reasoning that the duty to instruct sua sponte should not turn on which party had called a witness, and that distinguishing favorable from unfavorable testimony was burdensome for the trial court. (18 Cal.4th at pp. 568-569.) It held that "whenever an accomplice, or a witness who might be determined by the jury to be an accomplice," testified, the jury should be instructed to view an accomplice's testimony with care and caution "to the extent" that it tended to incriminate the defendant, "regardless which party called the accomplice." (*Id*. at p. 569.) This holding is the basis for the present version of CALJIC No. 3.18. (*Coffman*, *supra,* 34 Cal.4th at p. 105, fn. 36.)

The court in *Box* confronted an issue not directly controlled by *Guiuan*, namely, the propriety of accomplice testimony instructions when a codefendant testifies on his or her own behalf. (23 Cal.4th at p. 1209.) In *Box*, two defendants were charged with the same murders. (*Id*. at p. 1171.) At trial, one of the defendants did not testify, and he unsuccessfully requested instructions on accomplice testimony after his codefendant testified on his own behalf and attributing the killings to the defendant. (23 Cal.4th at p. 1175.)

The *Box* court concluded that the trial court should instruct the jury regarding accomplice testimony "*when requested by a defendant* in a case where the codefendant testifies." (23 Cal.4th at p. 1209, italics added.) It reasoned that "[t]here appear[ed] to be no persuasive reason not to require" such instructions under these circumstances, given the codefendant's self-interested motive to incriminate the defendant. (*Ibid*.)

2. *Underwood*

We begin with appellant's contention, insofar as it concerns accomplice testimony instructions regarding Underwood. In our view, there was sufficient evidence for the jury to determine that Underwood and appellant were accomplices, and thus the key issue is whether the trial court was required to give accomplice testimony instructions absent a request from appellant. This issue is not squarely addressed in *Box*.

We find guidance on it in *Coffman*, *supra*, 34 Cal.4th 1. In *Coffman*, two defendants were charged with the same offenses, including murder. (*Id*. at p. 16.) At trial, the defendants testified on their own behalf, and provided testimony that tended to incriminate the other. (*Id*. at p. 105.) The trial court then gave accomplice testimony instructions on its own motion. (*Id*. at pp. 103-104 & fn. 34.)

On appeal, the defendants contended that these instructions undermined the presumption of innocence and denied them due process. (34 Cal.4th at p. 105.) The court in *Coffman* rejected this contention, concluding that under the circumstances, "the court was *required* to instruct the jury that an accomplice-defendant's testimony should be viewed with distrust to the extent it tended to incriminate the codefendant." (*Ibid.*, italics added.) In support of this conclusion, the Coffman court cited *Guiuan*, as well as *People v. Alvarez* (1996) 14 Cal.4th 155, 217-218, in which the court held that the trial court is permitted to give such instructions when two codefendants testify on their own behalf, deny guilt, and incriminate the other.

In view of *Coffman*, we conclude that the trial court was required to give accomplice testimony instructions sua sponte. Respondent disagrees, citing *People v. Terry* (1970) 2 Cal.3d 362, overruled on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312, 381. In *Terry*, the defendant and his codefendant were

charged with the same murders. (2 Cal.3d at p. 373.) At trial, the codefendant testified on her own behalf and denied her guilt, but the defendant did not request instructions on accomplice testimony. (*Id*. at pp. 398-399.) On appeal, the defendant argued that the trial court was required to give such instructions sua sponte. The court in *Terry* disagreed. (*Id*. at p. 399.) However, because *Terry* predates *Guiuan* and its progeny, we conclude that it has been superseded by our Supreme Court's restatement of the rules governing accomplice testimony instructions in those cases.

Nonetheless, the instructional error here was not prejudicial. The jury received standard instructions on witness credibility (CALJIC Nos. 2.00, 2.06, 2.13), including the instruction that directs the jury's attention to a witness's potential "bias, interest, or other motive" (CALJIC No. 2.20). Furthermore, there was ample evidence corroborating Underwood's testimony regarding appellant, and the jury was aware that Underwood and appellant had motives to shift blame to each other. Under these circumstances, it was not reasonably probable that the jury would have reached an outcome more favorable to appellant had it received the instructions at issue here. (*Box*, *supra*, 23 Cal.4th at p. 1209; see *Coffman*, *supra*, 34 Cal.4th at p. 106.)

3. *Barmet*

Barmet was called as a witness by the prosecution, and thus the trial court was obliged to give accomplice testimony instructions sua sponte, provided that Barmet was a witness "who might be determined by the jury to be an accomplice." (*Guiuan*, *supra*, 18 Cal.4th at p. 569.) Accordingly, the key issue is whether there was evidence upon which a reasonable jury could have found that Barmet was an accomplice to Shapiro's or Bates's murder. (*Coffman*, *supra*, 34 Cal.4th at p. 106.)

The record lacks any such evidence. Regarding Shapiro's murder, the record establishes that Barmet's gun was used to kill Shapiro. However, nothing raises the reasonable inference that Barmet himself shot Shapiro, or that he authorized or helped appellant to kill Shapiro with his gun. Two witnesses aside from Barmet saw appellant handle a gun before the murder, no witness attributed to Barmet any role in the murder, and appellant flatly declined to identify the killer, even though he denied responsibility for the crime.

Regarding Bates's murder, nothing in the record raises the reasonable inference that Barmet played a role in this crime. Barmet testified that he associated with appellant, Underwood, and Duncan, and that his gun was forcibly taken from him, but not that he participated in Bates's murder. Neither appellant nor Underwood provided any testimony implicating Barmet in this murder.

Appellant argues that a portion of Detective Cooper's testimony is sufficient to establish that Barmet was an accomplice, given the evidence about Barmet's relationships with appellant, Underwood, and Duncan. During the cross-examination of Detective Cooper by Underwood's counsel, the following exchange occurred:

"Q. With regard to Mr. Barmet's participation in this crime, you received other information with regards to Mr. Barmet's participation; isn't that true?

"A. Repeat the question, Ma'am?

"Q. Specifically, did you receive information that Mr. Barmet was to receive money for the use of his gun in this case?

"A. Oh, yes. Yes.

"Q. So you received other information regarding Mr. Barmet's participation in this crime; isn't that true?

"A. After he was arrested, yes."

The prosecutor then elicited from Detective Cooper that this information came from Underwood. No further testimony was admitted on this topic.

In our view, a reasonable jury could not conclude that Barmet was an accomplice to Bates's murder, given this brief testimony. Nothing in Detective Cooper's testimony indicates that the payments were offered before Bates's murder, rather than after this event, or that Barmet had any knowledge of the role of his gun in Bates's murder prior to this crime. The testimony thus supports only speculation that Barmet "aided or abetted, or otherwise facilitated, with the requisite intent, any of [appellant's] criminal actions." (*Coffman*, *supra*, 34 Cal.4th at p. 106, italics omitted.)

In any event, any instructional error here was not prejudicial. Regarding Shapiro's murder, the jury received standard instructions on witness credibility, and it was aware that Barmet and appellant were present when Shapiro was killed. Furthermore, other witnesses corroborated Barmet's testimony regarding the killing. It is thus not reasonably likely that the jury would have returned a different verdict had it been instructed to view Barmet's testimony with care and caution.

Finally, regarding Bates's murder, Barmet testified that he had no direct knowledge of the killing on October 23, 2000, and other witnesses established appellant's role in these events. Rather, Barmet testified only about the manner in which the gun used to kill Bates left Barmet's possession. In determining that appellant alone was guilty of this murder, the jury evidently *disbelieved* Barmet while accepting the testimony from the other witnesses regarding appellant. Accordingly, there is no reasonable likelihood that accomplice testimony instructions regarding Barmet's testimony would have altered the jury's determination about appellant's role in the murder.

B. *Ineffective Assistance of Counsel*

Appellant also contends that his counsel rendered ineffective assistance by failing to seek accomplice testimony instructions. He is mistaken.

"In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, [a defendant] must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

Regarding instructions about Barmet's testimony, we have already determined that there is insufficient evidence to support such instructions (see Discussion, pt. A.3., *ante*), and thus appellant's counsel properly refrained from making a futile request. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

Regarding instructions about Underwood's testimony, the record discloses that appellant's counsel affirmatively rejected other instructions that gave the prosecution an opportunity to challenge appellant's credibility. Because a request for accomplice testimony instructions about Underwood's testimony was likely to trigger a request for similar instructions about appellant's testimony, appellant's counsel had a reasonable tactical basis for declining to call the matter to the trial court's attention. There was thus no ineffective assistance. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 501.) In any event, as we have explained (see Discussion, pt. A.2., ante), the failure to give the instructions was not prejudicial.

C. *Absence from Hearing*

Appellant contends that he was improperly excluded from a hearing during trial. Again, we disagree.

"A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution . . . ; the due process clause of the Fourteenth Amendment . . . ; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code." (*People v. Waidla* (2000) 22 Cal.4th 690, 741.)

As our Supreme Court explained in *People v. Waidla*, *supra*, 22 Cal.4th at pages 741-742, these rights are not unconditional: "Under the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.' (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17 . . . .) [¶] Similarly, under the Fourteenth Amendment's due process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a 'stage . . . that is critical to [the] outcome' and 'his presence would contribute to the fairness of the procedure.' (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745 . . . .) [¶] Under section 15 of article I of the California Constitution, a criminal defendant does not have a right to be personally present 'either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which [his] presence does not bear a """reasonably substantial relation to the fullness of his opportunity to defend against the charge."""' (*People v. Bradford* [(1997)] 15 Cal.4th [1229,] 1357 . . . .)" A defendant's rights under sections 977 and 1043 are also subject to this test. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 742.)

The propriety of excluding a defendant from a hearing is subject to our independent review, "insofar as the trial court's decision entails a measurement of the facts against the law." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 741.) Here, the record discloses the following facts: After the presentation of evidence and before the reading of instructions and closing arguments, Underwood or his counsel indicated that he might recant his testimony due to concerns about threats. Outside the presence of the jury, the trial court held a hearing attended by the prosecutor, Detective Dupree, Underwood and his counsel, and appellant's counsel, but not appellant. Appellant's counsel did not speak during the hearing, the record is silent about the reason for appellant's absence, and appellant never objected to his absence before the trial court, notwithstanding his posttrial representation by a different attorney, who filed a new trial motion on his behalf.

During the hearing, the trial court asserted that Underwood had an "absolute right" to testify and recant his prior testimony. Underwood indicated that he had heard that Jake and Duncan knew about his testimony, and he thought that by recanting he could protect himself and his family. He also acknowledged that in recanting he "wouldn't be telling the truth." The trial court explained that this posed a problem for his counsel, who would have to deal with what Underwood acknowledged as perjured testimony.

After Underwood repeatedly stated, "I don't want to lie," the trial court affirmed his right to testify, but suggested as an alternative that he ask Dupree about his family. When Dupree stated that Underwood's mother had moved her residence and was safe, Underwood decided not to take the stand. The trial court indicated that it would look into the safety of Underwood's transportation to and from jail, and ended the hearing. The parties then formally rested their cases.

Upon this record, we see no error in appellant's absence from the hearing. To begin, appellant's absence did not impair his due process rights under the

Fourteenth Amendment. Underwood *alone* was entitled to decide whether or not he should testify (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1332), and we discern no unfairness in the hearing regarding Underwood's decision. Accordingly, appellant's presence would not have contributed to the fairness of the hearing. Furthermore, the hearing occurred after Underwood had testified and been cross-examined at trial, and no evidence was admitted at the hearing. Appellant's absence therefore did not impair his Sixth Amendment rights because it did not interfere with his opportunity to cross-examine Underwood or any other witness.

Finally, there was no violation of appellant's rights under state law because his presence did not bear a "'"'"'reasonably substantial relation to the fullness of his opportunity to defend against the charge.'"'"' (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.) Here, appellant has "the burden of demonstrating that his absence prejudiced his case or denied him a fair trial." (*Ibid*.) He has failed to carry this burden.

Appellant suggests that had he been present, he might have encouraged his counsel (1) to argue at the hearing's outset that Underwood's proposal to recant his testimony should be accepted without inquiry, and (2) to object to the trial court's subsequent discussion with Underwood. We conclude that any such encouragement would not have enhanced appellant's ability to defend against the charges, and thus that appellant's absence was harmless beyond a reasonable doubt. (*People v. Hovey* (1988) 44 Cal.3d 543, 585.)

Underwood's proposal raised concerns about threats to Underwood and his family and about perjured testimony that the trial court could not properly ignore, notwithstanding any argument to the contrary from appellant's counsel. Furthermore, Underwood repeatedly stated that he did *not* want to recant his testimony, which he affirmed was true, and that his proposal was motivated solely by fear for himself and family. Appellant's counsel, who was aware of these facts,

elected not to urge Underwood to give testimony that Underwood described as a "lie." This tactical decision by appellant's counsel was within the scope of his authority. (*In re Horton* (1991) 54 Cal.3d 82, 95.)

It is thus pure speculation that appellant's presence could have altered Underwood's decision or the hearing's outcome. (Cf. *People v. Johnson* (1993) 6 Cal.4th 1, 18-19 [defendant fails to show that his absence from hearing about disaffected juror was prejudicial when he suggests that he would have encouraged his counsel to question the juror, given that his counsel absented himself from the hearing to avoid alienating the juror].)

D. *Sentencing*

Appellant also raises several contentions regarding sentencing. Regarding these matters, the record discloses the following: The jury found appellant guilty of Bates's and Shapiro's murders, found true the special circumstance alleged under section 190.2 regarding each murder, and also found true the gun use allegation under section 12022.53, subdivision (d), regarding each murder. In addition, appellant admitted a prior strike under the Three Strikes law.

In view of the special circumstances and gun use findings, the trial court sentenced appellant to LWOP (§ 190, subd. (a)) plus a consecutive enhancement of 25 years to life (12022.53, subd. (d)) for Bates's murder. It then *doubled* the LWOP term and gun use enhancement pursuant to section 667, subdivision (e)(1), and section 1170.12, subdivision (c)(1). The trial court subsequently imposed a similar sentence for Shapiro's murder.

Before resolving appellant's contentions, we address a discrepancy between the abstract of judgment and the trial court's orders at the sentencing hearing. The abstract of judgment indicates that the sentence for Shapiro's murder is *concurrent* with the sentence for Bates's murder. However, the record does not support this

notation. Prior to the sentencing hearing, the prosecutor filed a memorandum arguing that the LWOP term for each murder should be doubled and the sentences for the murders should be consecutive. During the hearing, the trial court imposed the sentence first for Bates's murder, imposed a similar sentence for Shapiro's murder, and then explained that the total sentence for the two murders was "life without possibility of parole, *four terms*, plus *100 years to life*." In view of these remarks, the trial court intended the sentence for Shapiro's murder to run consecutively--rather than concurrently--with the sentence for Bates's murder.

We therefore conclude that the abstract of judgment incorrectly reflects the trial court's rulings, and we address appellant's contentions in accordance with this conclusion.[10]

1. *Doubled LWOP Terms*

Appellant contends that the trial court erred in doubling his LWOP terms for each of his murder convictions under section 667, subdivision (e)(1), and section 1170.12, subdivision (d)(1). These provisions of the Three Strikes law state: "If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

Appellant argues that an LWOP term does not constitute a "determinate term or minimum term for an indeterminate term" within the meaning of section 667, subdivision (e)(1), and section 1170.12, subdivision (c)(1). We agree.

Two courts have reached contradictory conclusions on this issue. In *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433, the court acknowledged that these

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10 We also observe that the abstract of judgment mistakenly identifies count 4 as "count 5."

provisions do not expressly describe how a second strike defendant is to be sentenced if his current offense is one for which he would otherwise receive an LWOP term. It nonetheless concluded that they authorize a doubling of LWOP terms, citing the stated policy of the Three Strikes law, namely, "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses" (§ 667, subd. (b)). (73 Cal.App.4th at pp. 1433-1434.)

In *People v. Smithson* (2000) 79 Cal.App.4th 480, 503, the court reached the opposite conclusion. It reasoned that "[a]n LWOP sentence is an indeterminate sentence *without* a minimum term," and thus that such sentences fell outside the plain language of the provisions at issue. (*Ibid*.) In so concluding, it rejected *Hardy*, citing the principle that "[w]hen statutory language is clear and unambiguous, 'there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . . [citations].'" (Quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In our view, *Smithson, supra,* is the better reasoned case, and thus we decline to follow *Hardy, supra*. The trial court thus erred in doubling the LWOP term for each of appellant's murder convictions.

2. *Doubled Gun Use Enhancement*

On a related matter, appellant contends that the trial court also improperly doubled the 25-years-to-life gun use enhancement under section 12022.53, subdivision (d), pursuant to section 667, subdivision (e)(1), and section 1170.12, subdivision (c)(1).[11]

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[11] Appellant did not raise this contention of error in his opening brief. However, after the respondent's brief drew our attention to the potential error here in a footnote, appellant pressed the contention in his reply brief.

As respondent notes, "[i]n sentencing a defendant who has one prior strike, the court may not double any enhancements it imposes." (*People v. Hardy*, *supra*, 73 Cal.App.4th at p. 1433; see *People v. Dominguez* (1995) 38 Cal.App.4th 410, 424; *People v. Martin* (1995) 32 Cal.App.4th 656, 666, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600.) The doubling of the gun use enhancement was therefore error.

3. *Blakely Error*

Finally, in a supplemental brief appellant contends that the imposition of consecutive sentences for his murder convictions was improper under *Blakely v. Washington*, *supra*, 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). As we have explained, the trial court erred in doubling the LWOP terms and enhancements for each murder (see Discussion, pt. D.1., *ante*), and thus the sole issue is whether it properly imposed consecutive sentences for the two murders. In our view, this sentence is not invalid under *Blakely*.

At the outset, respondent argues that appellant has waived or forfeited this contention by failing to raise it before the trial court. Because appellant was sentenced before *Blakely*, we decline to find a waiver or forfeiture for the reasons that we recently explained in *People v. White* (2004) 124 Cal.App.4th 1417, 1433. We therefore examine appellant's contention on its merits.

Section 669 provides that "[w]hen [the defendant] is convicted of two or more crimes," the trial court is to "direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." If it fails "to determine how the terms of imprisonment on the second or subsequent judgment shall run, the terms of imprisonment on the second or subsequent judgment shall run concurrently." (§ 669.) Despite this language, courts have held "there is no . . . statutory presumption in favor of concurrent

rather that consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 does not specify the grounds upon which the trial court's decision to impose consecutive sentencing must lie. Rule 4.425 of the California Rules of Court enumerates "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences," which include aggravating and mitigating circumstances.[12] Rules 4.421 and 4.423 identify as aggravating and mitigating circumstances such matters as the violence involved in the crime, the degree of cruelty, viciousness, or callousness evidenced by the perpetrator, the vulnerability of the victim, threats made to witnesses, the perpetrator's active or passive role in committing the offense, and the presence or absence of a prior record.

The key issue is whether *Blakely* proscribes the trial court's exercise of this discretion under the circumstances of this case. We begin by observing that *Blakely* relies on the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, defendant's sentence had been doubled because the trial

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12 The criteria listed in rule 4.425 are: "(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences."

court found the crime to have been motivated by racial animus. The court held that the doubling was improper because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (530 U.S. at p. 490.)

In *Blakely*, the defendant was convicted of kidnapping under Washington state law. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) The trial court increased the defendant's sentence for this offense above the statutorily defined standard range for the offense (Wash. Rev. Code Ann. § 9.94A.320) pursuant to a separate statutory provision permitting such exceptional sentences when the trial court found that there were "substantial and compelling reasons" (*id*. at § 9.94A.120(2)). (124 S.Ct. at p. 2535.) The court in *Blakely* concluded that *Apprendi* barred the enhanced sentence because the jury had not determined the facts cited by the trial court for increasing the sentence. (*Id*. at p. 2539.)

We do not believe that *Blakely* or *Apprendi* apply to the sentencing decision before us. Although a trial court contemplating whether to impose consecutive sentences may and often does consider aggravating and mitigating factors as part of its decisionmaking process, its decision does not involve the facts necessary to constitute a statutory offense, and the decision can be made only after the accused has been found beyond a reasonable doubt to have committed two or more offenses.

Prior to the decision in *Blakely*, but in the wake of *Apprendi,* the court in *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231, stated: "If the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant had been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense

established by the jury is implicated, then the state may consider this factor based on a lesser standard of proof." (Fn. omitted.)

In *People v. Cleveland* (2001) 87 Cal.App.4th 263, the defendant raised the similar issue of whether the rule announced in *Apprendi* was implicated by the trial court's refusal to apply section 654. "Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (87 Cal.App.4th at pp. 267-268.)

Because of the requirement that the trial court determine the offender's "intent and objective," the defendant in *Cleveland* contended that application of section 654 ran afoul of *Apprendi*. (87 Cal.App.4th at p. 270.) The Court of Appeal disagreed: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the

maximum penalty beyond the statutory range authorized by the jury's verdict." (*Ibid*.)

We conclude that a trial court's imposition of consecutive sentences does not usurp the jury's factfinding powers, provided that each sentence imposed is within the pertinent offense's prescribed statutory maximum. Although our laws permitted the trial judge to order the separate sentences imposed for each crime run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and can result in a lessening of the prescribed sentence, but never in an enhancement.

This reasoning applies with special force here, given the nature of the sentence imposed on each murder. The jury found that appellant committed two distinct murders, and found, inter alia, that each murder involved special circumstances and gun use. Under the circumstances of this case, these findings obliged the trial court to impose a sentence of LWOP plus 25 years to life for each murder. (*People v. Mora* (1995) 39 Cal.App.4th 607, 614-618; § 190, subd. (a); § 12022.53, subd. (d).)

In *People v. Garnica* (1994) 29 Cal.App.4th 1558, 1564, the court held that the trial court may properly impose concurrent LWOP sentences on two different murders. In so concluding, it observed that "[i]n reality, defendant can serve only one such sentence, no matter how many are imposed and no matter whether they are consecutive or concurrent." (*Ibid*.) It further remarked: "We cannot conceive that defendant would suffer any actual prejudice from the imposition of more than one LWOP sentence, whether consecutive or concurrent." (*Ibid*.)

These points are also true of the sentences imposed here. In all material respects, consecutive sentences of LWOP plus 25 years to life are indistinguishable from concurrent sentences of this kind. Thus, the trial court's decision here to

impose consecutive sentences cannot be regarded as an enhancement of appellant's punishment.

For these reasons, we do not believe that the sentence imposed is invalid under *Blakely* or *Apprendi*.

DISPOSITION

The judgment is modified to reflect that appellant's sentence on count 1 is LWOP plus 25 years to life (§ 12022.53, subd. (d)), and his sentence on count 4 is a consecutive term of LWOP plus 25 years to life (§ 12022.53, subd. (d)).[13] In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect this modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

HASTINGS, Acting P.J.

GRIMES, J.*

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[13] The three-year enhancement (§ 12022.5, subd. (a)) under count 4 remains stayed. (§ 654.)

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.